IN THE

Supreme Court of the United States

No. 70-5097

ALEXANDER McCLANAHAN,

Petitioner,

v. v.

MORAUER AND HARTZELL, INC., and
LIBERTY MUTUAL INSURANCE COMPANY, ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. The Court of Appeals Correctly Held that Petitioner Made a "Compromise" of His Third-Party Suit that Barred Further Compensation	6
A. Section 33(g) and Its Judicial Construction	6
B. New York Decisions	9
C. The Court of Appeals' Decision Must Be Affirmed	13
II. Petitioner's Claim for Additional Compensation Was Not Timely Filed	14
III. Petitioner's Pleading Attacking The Deputy Commissioner's Finding of Disability Was Not Timely Filed, and, in Any Event, There Was Substantial Evidence to Support that Finding	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:

Associated Indemnity Corp. v. Marshall, 71 F.2d 235 and 420 (9th Cir. 1934)	16
Banks v. Chicago Grain Trimmers Ass'n., Inc., 390 U.S. 459 (1968)	*passim*
Bell v. O'Hearne, 284 F.2d 777 (4th Cir. 1960)	*passim*
Bruce v. Westinghouse Electric Corp., ___ App. Div. 2d ___, 320 N.Y.S.2d 603 (1971)	12
Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947)	18
Clark v. Oakes & Burger Co., 16 App. Div. 2d 490, 229 N.Y.S.2d 513 (1962)	11, 12
Gallagher v. Carol Construction Co., 272 N.Y. 127, 5 N.E.2d 63 (1936)	8, 9, 12

Kiser v. Bartley Mining Co., 397 S.W.2d 56 (Ky. 1965) 17

Klump v. Erie County Highway Department, 275 App. Div. 1017, 91 N.Y.S.2d 689 (1949) 9

Kushner v. Kingston Knitting Mills, Inc., 2 App. Div. 2d 394, 156 N.Y.S.2d 474 (1956) 10

Marlin v. Cardillo, 68 App. D.C. 201, 95 F.2d 112 (1938) 6, 7

O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951) ... 18

Richardson, Secretary of Health, Education, and Welfare v. Perales, 402 U.S. 389 (1971) 18

Roth v. Harlem Funeral Car Co., 268 N.Y. 661, 198 N.E. 545 (1935) 9

Sadowski v. J.W. Danforth Co., 2 App. Div. 2d 728, 152 N.Y.S.2d 626 (1956) 10

Scott v. Alaska Industrial Board, 123 F. Supp. 361 (D. Alaska 1954) 16

Sigismondi v. Sigismondi Excavators, Inc., 33 App. Div. 2d 625, 304 N.Y.S.2d 732 (1969), modified on reargument, 33 App. Div. 2d 944, 307 N.Y.S.2d 856 (1970) 12

Voehl v. Indemnity Insurance Company of North America, 288 U.S. 162 (1933) 18

Statutes and Rules:

Longshoremen's and Harbor Workers' Compensation Act:

Section 2(10) (Title 33, U.S. Code, Sec. 902(10)) 18

Section 13 (Title 33, U.S. Code, Sec. 913) 5, 15

Section 19 (Title 33, U.S. Code, Sec. 919) 15, 16

Section 21(a) (Title 33, U.S. Code, Sec. 921(a)) 6, 16, 17

Section 22 (Title 33, U.S. Code, Sec. 922) 5, 14, 15, 16

Section 33(g) (Title 33, U.S. Code, Sec. 933(g)) ..... *passim*

Federal Rules of Civil Procedure, Rule 81(a)(6) 6, 17

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COUNTER-STATEMENT OF THE CASE

The question this case presents under Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U.S. Code, Section 933(g)) is whether the petitioner, without his employer's consent, "compromised" his suit against a third party, which "compromise", by the terms of Section 33(g), thereafter barred him from recovering any

further compensation to which he "would be" entitled under the Longshoremen's Act. Section 33(g) is thus prospective in effect, barring any future compensation after such an unconsented "compromise." Contrary to what might be inferred from petitioner's phrasing of this question (Brief, p. 2), the prospective effect of Section 33(g) does not depend upon the amount of compensation an employee has been awarded prior to his making the "compromise."

The details of petitioner's accident, which petitioner sets forth at length at pages 3 and 4 of his Brief, are not of record. The statements which petitioner attributes to Judge Youngdahl (Brief, p. 5) appear only in a memorandum which petitioner's counsel filed with the Deputy Commissioner (A. 55), which memorandum is not *evidence* of the alleged statements. There is also nothing of record to show the content of the file in petitioner's third-party suit or to support petitioner's statement (Brief, p. 5) that the file contained his deposition and a pretrial statement.

Petitioner is mistaken when he states (Brief, p. 6) that John F. Mahoney, Esquire, counsel for the third party, was respondents' witness at the hearing before the Deputy Commissioner. The transcript of that hearing makes it clear that Mr. Mahoney was *petitioner's* witness and that he testified "by and on behalf of the claimant" (A. 31). His testimony represents the extent of the evidence contained in the record of what transpired before Judge Youngdahl.

Mr. Mahoney testified that on February 20, 1967, the date set for the trial of petitioner's third-party action, counsel for the parties met in Judge Youngdahl's chambers, at which time, "in his usual manner," the judge discussed settlement of the case with counsel jointly and separately (A. 32). "As a result of the conference, an agreement was reached at $5,000.00," and the case was settled for that sum (A. 32). Petitioner's counsel made an initial demand of $9,000.00, and the third-party's counsel offered $5,000.00, which was generally the limit of his authority (A. 36-37). In the discussion, Judge Youngdahl "bandied several

figures around," and "some time during the discussion" he "felt that the case was worth $5,000.00" (A. 32, 36). Mr. Mahoney testified there were no settlement discussions between the parties themselves outside the presence of the judge, but all the discussions "took place either between the judge and the plaintiff's attorney or the judge and myself or the judge and both of us present and there was a hearing following the informal conference in Chambers in open court in which Mr. McClanahan was asked whether he was aware of the terms of settlement and was he satisfied with the terms of settlement and whether he realized that it would be a final settlement and he said yes." (A. 34)

Petitioner was an adult (A. 27, 35). There was no trial on the merits, no testimony offered, no jury impanelled, and no verdict rendered (A. 36). The discussions related to a settlement of the case and were not an adjudication of the case in the sense of a trial of the facts and of the issues involved (A. 36). Petitioner himself testified he was not in the judge's chambers during the settlement discussions (A. 38) and that, other than stating he agreed to the settlement, he did not testify before the judge or was asked or told him about the accident or his injuries (A. 39).

Petitioner does not set out the grounds of the Court of Appeals' decision. That decision (A. 69-73), by a unanimous three-judge panel of the Court composed of Judges McGowan, MacKinnon, and Robb, found that petitioner had been injured at his employment in 1962, and that he had thereafter filed a claim and the Deputy Commissioner had awarded him compensation in 1964. The Court found that while the claim was pending, petitioner had filed a suit against a third party, and on the day that case was set for trial, February 20, 1967, counsel for the petitioner and the third party "were called into chambers by the trial judge to discuss settlement" (A. 70). The Court then describes what happened: "Following his usual practice in exploring settlement possibilities in civil matters, the judge first conferred with both attorneys together and then spoke privately with each one. It appears that at some point during these discus-

sions the judge suggested that, having reviewed the file, the claim seemed to him to be worth $5,000.00. Although other figures were apparently also considered, the parties finally settled on the $5,000.00 figure, and on March 3, 1967, a consent judgment for that amount was entered. Appellant's wife received $3,000.00 and appellant received $2,000.00. Attorney's fees consumed $800.00 of appellant's share and the remaining $1,200.00 was turned over to the employer and its insurer . . ." (A. 70).

The Court noted (A. 72) that petitioner chiefly relied upon *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968), but held (A. 73):

> "The case before us is clearly distinguishable. First, the consent judgment was not the result of the judge's independent finding of the value of the claim after full presentation of the evidence, but was at most an informal exploratory attempt to determine the possibilities for private settlement—a practice within a familiar tradition and well understood by the participants. Second, the record does not indicate, and appellant has not argued, that the trial judge in any way forced acceptance of his suggested figure by indicating that it was the highest amount he would accept from the jury if appellant decided to go to trial. Third, since appellant was free to reject the settlement opportunity and have the case heard, the possibility of prejudice to the employer, arising from appellant's acceptance of a lesser amount than a jury might award, did exist here.
>
> "In no way can this private compromise be considered a judicial determination. Certainly the mere intervention of the trial judge at the pretrial stage in an effort to encourage settlement does not make the agreement any less a private compromise. *Compare Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960). In view of the parties' stipulation that no written consent to this compromise was secured from the employer, appellant's subsequent claim before the Bureau was barred, as the District Court found, under Section 933(g)."

SUMMARY OF ARGUMENT

I. The Court of Appeals correctly understood and applied this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968), when it found that the petitioner had "compromised" his suit against a third party without the employer's consent and that therefore Section 33(g) of the Longshoremen's Act barred him from recovering further compensation, where the Court of Appeals found that the trial judge had made no "independent finding of the value of the claim after full presentation of the evidence," but made "at most an informal exploratory attempt to determine the possibilities of private settlement" and had left the parties free to accept or reject his suggested settlement figure. There was no trial, no testimony offered, no jury impanelled, and no verdict rendered. The trial judge therefore did not make a "judicial determination" of petitioner's claim against the third party, and the Court of Appeals properly found there was danger that petitioner might accept too little for his third party cause of action.

II. Petitioner's claim for further compensation was not filed with the Bureau of Employees' Compensation within the one year period provided by Section 22 of the Longshoremen's Act (Title 33, U.S. Code, Section 922) and respondents did not waive this defense when they did not raise it at the "first hearing" required by Section 13(b) of the Act (Title 33, U.S. Code, Section 913(b)), but did timely raise it before the case record was closed, since Section 13(b) by its terms is applicable only to claims for original injuries and there is no indication that Congress intended that section also to apply to claims for additional compensation under Section 22, that section containing its own time limitation and making no direct reference to Section 13.

III. Petitioner's "Cross-claim and Counter-claim," making an attack upon the Deputy Commissioner's order for failure to award petitioner permanent total compensation, was not timely filed in the District Court within the thirty-day

period provided by Section 21(a) of the Longshoremen's Act (Title 33, U.S. Code, Section 921(a)), and it was therefore barred in accordance with decisions interpreting this section of the Longshoremen's Act and other similar workmen's compensation acts. Cases decided under the Federal Rules of Civil Procedure are not applicable to this question, because this is a "matter of procedure" that is provided for by the Longshoremen's Act and therefore is expressly excepted from the Federal Rules pursuant to Rule 81(a)(6). In any event, there was substantial medical evidence which supported the Deputy Commissioner's denial of permanent total disability and his finding that petitioner's condition had reverted to its pre-injury status as of a certain date.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER MADE A "COMPROMISE" OF HIS THIRD PARTY SUIT THAT BARRED FURTHER COMPENSATION.

A. Section 33(g) and Its Judicial Construction

When, as the Longshoremen's Act allows, an employee brings suit against a third party, Section 33(g) (Title 33, U.S. Code, 933(g)) provides:

> "If *compromise* with such third person is made by (the employee) of an amount less than the compensation to which such (employee) would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) *only if* such compromise is made with his written approval." (Emphasis added).

There are three principal decisions that interpret Section 33(g) on the question of what constitutes a "compromise": *Marlin v. Cardillo*, 68 App. D.C. 201, 95 F.2d 112 (1938); *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960); and this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968).

In *Marlin v. Cardillo*, decided in 1938, the Court found simply that after an award of compensation the employee's widow had commenced a suit against a third party, "but on February 3, 1936, without obtaining the consent of the employer or the carrier, [she] settled and compromised it for $1,995.00" and "A verdict and a judgment entered in her favor were duly marked satisfied." The widow then filed a claim for further compensation under the Act, but the Court concluded that she had compromised her third party suit without the consent of the employer and therefore under Section 33(g) she could not recover further compensation.

In *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960), a longshoreman was killed when he jumped from his employer's vessel to escape a collision with another ship. His parents sued a third party and recovered judgment in the amount of $6,500.00. The third party noted an appeal; and before that appeal was heard, the employee's parents accepted $5,000.00 in satisfaction of that judgment without obtaining the written approval of the employer. The parents then filed and were granted a claim for deficiency compensation in excess of the *face amount* of the judgment. The Court of Appeals upheld this award. After reviewing New York cases and distinguishing *Marlin v. Cardillo* on the ground that "there settlement of the plaintiff's claim was reached before the court had established the amount of the third party's liability and reduced it to judgment" (284 F.2d, at 779), the Court of Appeals held:

> "Where, however, there has been a *judicial determination* of the damages, there is no possibility whatever of prejudice to the employer from the judgment creditor's subsequent consent to a diminution in payment. . . ." (Emphasis supplied) (284 F.2d at 780)

Finally, and most specifically stating the test to be applied, is this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968). There, the petitioner's husband died as the result of a fall he suffered on his way

home from work. Petitioner made claim for death benefits, but her claim was denied because there was insufficient proof that her husband's death was work-connected. She filed a second claim for death benefits and then began a suit against a third party to recover damages for her husband's death. In that suit, a verdict was rendered in her favor for $30,000, and the third party moved for a new trial. The trial judge ruled that he would grant this motion unless the petitioner agreed to a remittitur of $11,000. Petitioner then agreed to this without consulting her husband's employer, and a judgment in the third party suit was entered in her favor for $19,000. There was later a hearing on the petitioner's second claim for death benefits, and the Deputy Commissioner entered an award. The employer then sought judicial review of this award, arguing, among other points, that petitioner's acceptance of the remittitur was a "compromise" under Section 33(g). This Court rejected that argument (390 U.S., at 466-467), finding first that under New York law, after which the Longshoremen's Act was patterned, it had been held that a remittitur is not a compromise (citing and quoting from *Gallagher v. Carol Construction Co.*, 272 N.Y. 127, 5 N.E.2d 63 (1936)). This Court then declared:

> "An order of remittitur is a *judicial determination* of recoverable damages; *it is not an agreement among the parties involving mutual concessions.* Section 33(g) protects the employer against his employee's accepting too little for his cause of action against a third party. That danger is not present *when damages are determined,* not by negotiations between the employee and the third party, *but rather by the independent evaluation of a trial judge.* Cf. Bell v. O'Hearne, 284 F.2d 777." (390 U.S., at 467). (Emphasis supplied)

B. New York Decisions

Because this Court may look again at New York cases as relevant in deciding this case, the following New York cases may be noted, all being decided by the New York Court of Appeals or by the Third Department of the Appellate Division of the New York Supreme Court.

In *Gallagher v. Carol Construction Co.*, 272 N.Y. 127, 5 N.E.2d 63 (1936), which this Court cited and quoted in the *Banks* case, the New York Court of Appeals ruled that a claimant's accepting a remittitur that would reduce a $5,000 verdict to a judgment of $2,000 was not a compromise. The Court of Appeals distinguished one of its prior decisions (*Roth v. Harlem Funeral Car Co.*, 268 N.Y. 661, 198 N.E. 545 (1935)) as involving an agreed settlement out of court where "No verdict was recorded, and no judgment thereon was entered." The Court declared:

> "The contrary is true here. The judgment for $2,000 was rendered in accordance with immemorial common-law practice *after a full and constitutional jury trial.* The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial *actually had* which eventuated by constitutional practice in a judgment actually entered." (Emphasis supplied) (5 N.E.2d, at 64).

It was after saying this that the New York Court of Appeals held, in the language this Court quoted in the *Banks* case, that: "Plaintiff's stipulation consenting to take that portion of the verdict *judicially determined* as being not excessive does not fall within any recognized meaning of the word 'compromise'" (Emphasis supplied) (5 N.E.2d, at 64).

In *Klump v. Erie County Highway Department*, 275 App. Div. 1017, 91 N.Y.S.2d 689 (1949), cited in *Bell v. O'Hearne*, there was an appeal from a compensation award on the ground that a settlement of a third party suit had been made without the consent of the carrier. In a brief per

curiam opinion, the Court affirmed the award, stating that: "The judgment, which claimant *recovered* in his third party action, represents the trial court's evaluation of the damages sustained and was not the result of any settlement or compromise between the parties." (Emphasis supplied) From this, it seems certain this case involved a judgment recovered after trial before a trial judge, perhaps sitting without a jury, but still thus making a "judicial evaluation" of the damages upon evidence presented.

In *Sadowski v. J.W. Danforth Co.*, 2 App. Div. 2d 728, 152 N.Y.S.2d 626 (1956), the Court concluded that there had been no compromise where "Prior to trial of the action, the attorneys concerned had two or three discussions as to settlement. On the day the case was reached for trial, claimant's attorney told him he believed the case would be settled and later asked him to approve a settlement figure of $10,000, which he did. In the presence of his attorney and an insurance company representative, claimant signed a paper, but so far as appears no effort was made to subpoena such paper on the hearing herein. When the case was reached, both attorneys appeared and waived a jury. *Claimant testified as to all the facts relevant to liability and damages and exhibits were received.* Defendant's attorney did not cross-examine and put in no proof. *The trial court then found defendant negligent and the plaintiff free from negligence and directed judgment for $10,250.00.*" (Emphasis supplied) The Court concluded:

> "We cannot say, as a matter of law, upon the record before us, that this result did not represent the trial court's considered judgment and evaluation, based on the evidence, which appears to have been adequate to enable him to reach a fair determination."

In *Kushner v. Kingston Knitting Mills, Inc.*, 2 App. Div. 2d 394, 156 N.Y.S.2d 474 (1956), also cited in *Bell v. O'Hearne*, the Court found no compromise where the claimant and her husband "recovered judgment" against the third party. Jury trial was waived, and the parties proceeded before the trial justice sitting alone. The claimant testified

"as to her employment, the happening of the accident, the extent of her injuries, the medical treatment received, her earnings at the time of the accident, the length of time lost from work, and her work activity following the accident." She was then cross-examined "concerning her awareness of the work being carried on by defendant in the employer's factory, the happening of the accident and the continuation of her medical treatment." After this, it was stipulated that the third party was doing work at the employer's plant which the claimant alleged was negligently performed. The trial justice then found that the defendant's negligence was the sole cause of the claimant's injuries, and that those injuries and the claimant's pain and suffering and medical expenses "*entitled* her to a verdict" of $3,250.00 and that her husband "was *entitled* to a verdict" of $500 for the loss of his wife's services. (Emphasis supplied) Thereafter, "Formal findings of fact and conclusions of law were presented to the trial justice and signed by him. Judgment thereon was accordingly entered." The employer alleged that the record showed that the trial was "not a legitimate contest between opposing parties," that the insurance carrier had refused to settle, and that the claimant's attorney knew the limits of the third-party's insurance policy were $5,000. The Court held that "These factors are evidence which must be considered with the presumption of regularity which attaches to a trial, followed by a formal decision of the trial justice and a judgment." Quoting then from the *Sadowski* case, *supra,* the Court sustained the subsequent award of compensation.

The case of *Clark v. Oakes & Burger Co.*, 16 App. Div. 2d 490, 229 N.Y.S.2d 513 (1962), involved a fact situation that was the same as in *Bell v. O'Hearne,* from which the Court quoted extensively. As in *Bell v. O'Hearne,* the claimant had also recovered a judgment in his third-party suit and the third party noted an appeal, but agreed to drop the appeal if the claimant accepted a lesser sum to satisfy the judgment, which the claimant did. Finding that this was no bar to later recovery of deficiency compensation, the Court stated:

> "The dictates which have required the stern application of subd. 5 prior to judgment even when events *subsequently* indicate that no prejudice to the carrier is involved disappear when a judgment is entered and the continued prosecution of an appeal could not possibly benefit the carrier . . . . Any loss is from the claimant's own pocket. Can we say that he cannot give up part of his protection, completely at his own expense, to insure a favorable recovery?"

In *Sigismondi v. Sigismondi Excavators, Inc.*, 33 App. Div. 2d 625, 304 N.Y.S.2d 732 (1969), *modified on reargument on other grounds*, 33 App. Div. 2d 944, 307 N.Y.S.2d 856 (1970), the claimant's husband suffered a fatal injury at work. She sued a third party and recovered a verdict for $8,500.00, which by stipulation was increased, and judgment awarded for $54,350.85. This judgment was later compromised for $24,000.00 by order of the Surrogate's Court, and the claimant then obtained an award of death benefits. On appeal, the Court affirmed this award, finding there had been no "compromise of any . . . cause of action . . ." under the Workmen's Compensation Law and stating:

> "To be distinguished from the compromise of a cause of action is the compromise of a judgment. When a third-party action has been tried to its conclusion *and the measure of liability has been judicially determined*, the carrier is not prejudiced by a subsequent compromise entered into by the parties to the action in an effort to facilitate satisfaction of the judgment. (Matter of Gallagher v. Carol Constr. Co., 272 N.Y. 127, 5 N.E.2d 63; Matter of Clark v. Oakes & Burger Co., 16 A.D.2d 490, 229 N.Y.S.2d 513)" (Emphasis supplied).

The most recent New York decision on this subject appears to be *Bruce v. Westinghouse Electric Corp.*, ___ App. Div. 2d ___, 320 N.Y.S.2d 603 (1971). Citing *Clark v. Oakes and Burger Co., supra*, the Court found there had been no compromise that required the carrier's consent. "Claimant's attorney in the negligence action testified that both before

and after the *trial*, which was rendered in a jury verdict of no cause of action which the Trial Judge set aside, he rejected offers to settle the action for $10,000, the policy limit of the defendant's liability insurance policy, because the appellant would not consent to settlement. And while thereafter claimant successfully moved to amend his *ad damnum* clause to $10,000 and the trial court granted judgment in his favor for that amount, the attorneys who represented the parties in the negligence action testified at the compensation hearing to the effect that the motion for judgment in favor of the claimant *was left entirely to the trial judge and that no agreement was made with the judge* and the judge testified that there was no advance agreement as to claimant's motion and *essentially that he exercised his 'free judgment' in disposing of the motions.*" (Emphasis supplied).

C. The Court of Appeals Decision Must be Affirmed

The Court of Appeals correctly understood this Court's decision in the *Banks* case to mean that there is a "compromise" under Section 33(g) barring further compensation when settlement of a third-party suit is not the result of "the judge's independent finding of the value of the claim *after full presentation of the evidence*" (Emphasis supplied). There was in this case no trial on the merits, no testimony was offered, no jury was impanelled, and no verdict rendered (A. 36, 39-40), so that the parties' dispute was never adjudicated. Judge Youngdahl's evaluation of the case as being worth $5,000 was for the purpose of settlement, where many considerations come into play, such as the odds of recovery, the effect of conflicting testimony and medical evidence, and other matters, all of which differ materially from evaluating and deciding a case from the point of view of the trier of facts and the judge of the law. Respondents submit that it is clearly only this latter function that can constitute a "judicial determination" of the case.

There indeed can be no *judicial* determination or evaluation of a case unless, as with an order of remittitur as in the *Banks* case, the judge acts in his judicial capacity, that is, he evaluates the case upon review of sworn testimony and evidence of record. Absent this, as was the situation here, the judge's expression of his "feelings" of the worth of the case, stated in the course of his participation in pretrial settlement discussions with the parties' counsel in his chambers, does not constitute his judicial act. Furthermore, as the Court of Appeals rightly held, the record shows no indication that Judge Youngdahl in any manner forced or imposed his evaluation upon counsel, but that both counsel felt entirely free from any threat of adverse action by the judge to accept or reject the $5,000 figure. This again stands in sharp contrast to the remittitur procedure in the *Banks* case where the trial judge, in effect, ordered the plaintiff to accept an amount less than the verdict on pain that he would otherwise grant the defendant's motion for a new trial. Thus, the Court of Appeals was accurate when it found that Judge Youngdahl had made "at most an informal private settlement—a practice within a familiar tradition and well understood by the participants," and did not in any way force acceptance of his suggested figure. This amounted to the parties' private, mutually arranged, settlement of the case, and it presented and preserved, as the Court of Appeals concluded, the danger against which Congress intended Section 33(g) to protect the employer, that his employee might, in making such a "compromise," accept too little for his cause of action against the third party.

II.

PETITIONER'S CLAIM FOR ADDITIONAL COMPENSATION WAS NOT TIMELY FILED

Section 22 of the Longshoremen's Act (Title 33, U.S. Code, Section 922) requires that claims for additional compensation must be filed with the Bureau of Employees' Compensation within one year after the last payment of

compensation under the award thus sought to be modified. Here, however, the last payment of compensation under the award of August 24, 1964, was paid to petitioner on August 24, 1964 (A. 7) and the claim for additional compensation was filed on July 26, 1967 (A. 7, 27-28).

Petitioner argues that respondents waived this defense by not asserting it at the "first hearing" as required by Section 13(b) of the Act (Title 33, U.S.Code, Section 913(b)). Respondents raised this defense in a memorandum filed after the hearings but before the record was closed (A. 59, 48, 49), and they submit this was timely and caused no prejudice to petitioner, who could thereafter have submitted material responsive to this defense. In any event, while they find no case deciding this question, they submit that Section 13(b) clearly does not apply to claims for additional compensation under Section 22. Section 13(a) provides that claims must be filed within one year "after the injury" and thus pertains to original claims and not claims for additional compensation. Section 13(b), upon which petitioner relies, then states that "Notwithstanding the provisions of subdivision (a)," the failure to file a claim within the one-year period will not bar the claim unless objection on this ground is made at the "first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." Section 13(b) thus applies by its terms only to the claims mentioned in Section 13(a), not to claims under any other section of the Act.

Section 22, on the other hand, contains its own time limit and does not refer directly to Section 13 or otherwise provide that objection for failure to meet that time limit must be raised at any particular stage of the proceeding. Section 22 does provide that when a claim for additional compensation is timely filed, "the deputy commissioner may . . . review a compensation case in accordance with the procedure prescribed in respect of claims in section 19." Subsection (a) of Section 19 states that "Subject to the provisions of section 13," a claim for compensation may be filed with the deputy commissioner "at any time after the

first seven days of disability following any injury, or at any time after death," but here again this pertains only to original claims and not to claims for additional compensation. The remainder of Section 19 sets forth the procedure which the Deputy Commissioner must follow in processing and deciding the claim, and respondents submit that it is only to this procedure that Section 22 refers. Section 13(b) therefore does not govern the time when objection for failure to make timely claim for additional compensation under Section 22 may be raised, since if Congress had so intended, it would have phrased Section 22 to make a more direct and unambiguous reference to Section 13.

III.

PETITIONER'S PLEADING ATTACKING THE DEPUTY COMMISSIONER'S FINDING OF DISABILITY WAS NOT TIMELY FILED, AND, IN ANY EVENT, THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THAT FINDING.

A. Section 21(a) of the Longshoremen's Act (Title 33, U.S. Code, Section 921(a)) requires that actions to enjoin and set aside workmen's compensation awards must be brought within 30 days of the entry of the award, after which the award becomes final. The award here was filed on August 12, 1968, but petitioner's "Counter-claim and Cross-claim," raising for the first time the issue of the lawfulness of the finding of temporary partial disability, was not served until January 14, 1969, and not filed until March 4, 1969 (A. 65, 66). This cross-claim and counter-claim charged that the order was unlawful and not supported by the evidence, and it thus was an appeal from and attack upon that order and an effort to have the order suspended and set aside. Since, therefore, the cross-claim and counter-claim raising this issue was not filed within 30 days from the date of the order, it was not timely and must be disregarded. *Associated Indemnity Corp. v. Marshall*, 71 F.2d 235 and 420 (9th Cir. 1934); *Scott v. Alaska Industrial*

Board, 123 F. Supp. 361 (D. Alaska 1954); *Kiser v. Bartley Mining Co.*, 397 S.W.2d 56 (Ky. 1965).

Petitioner's reliance on cases under the Federal Rules of Civil Procedure is of no avail because the application of those Rules is excepted on this issue by Rule 81(a)(6), as the timeliness of appeals from orders of the Deputy Commissioner is a "matter of procedure" that is provided for by Section 21(a) of the Longshoremen's Act.

B. On the merits of the issue thus sought to be raised, the Deputy Commissioner's finding that petitioner sustained temporary partial disability that ended as of November 1, 1965, and at that point his condition reverted to its pre-injury status, was clearly supported by the substantial evidence of record.

At the hearing, petitioner's medical witness was Dr. Marvin Korengold, a specialist in neurology (A. 10). From a neurological standpoint, there was no dispute that Dr. Korengold testified that petitioner's disability was "zero" (A. 21). Petitioner relies upon Dr. Korengold's testimony that he believed petitioner was emotionally disabled and that the accident aggravated his pre-existing condition (A. 21), but in saying this, Dr. Korengold testified: "From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair of me to state." (A. 21). Further, at the hearing the following colloquy took place regarding Dr. Korengold's testimony:

Q. "But you have indicated, I think, that since we are dealing with the emotions, it is more peculiarly the field of the psychiatrist both as regards diagnosis and treatment?

A. "I think basically this is true, yes." (A. 24)

On the other hand, there was of record before the Deputy Commissioner, as offered by respondents, a report, dated December 23, 1965, by Dr. Leon Yochelson, a psychiatrist (A. 50-54, 48, 49), in which Dr. Yochelson found, after a thorough examination of petitioner and a study of his past

records, that there was no relationship between his complaints and his injury on October 19, 1962 (A. 54).

Such evidence of record provided a substantial basis for the Deputy Commissioner to conclude, as he did, that petitioner should be paid on the basis of temporary partial disability from November 2, 1963 to October 31, 1965, and that on November 1, 1965, his condition reverted to what it was immediately before the injury. Under accepted law, the Deputy Commissioner's findings on questions of fact and credibility of witnesses must be accepted if supported by "substantial evidence." *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-78 (1947); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Voehl v. Indemnity Insurance Company of North America*, 288 U.S. 162, 166 (1933); *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 467 (1968).

Especially in view of the weakness of Dr. Korengold's testimony on what he admitted was a psychiatric question, the Deputy Commissioner could reasonably choose to credit Dr. Yochelson's report, which in this situation, absent any request by petitioner to cross-examine him, was acceptable as substantial evidence to support the award. Cf., *Richardson, Secretary of Health, Education, and Welfare v. Perales*, 402 U.S. 389 (1971). The form of the Deputy Commissioner's "status" finding, which petitioner argues was insufficient, since it did not find that petitioner was able to return to work, was, to the contrary, lawful and proper, since, in effect, it found that as of November 1, 1965, petitioner's injuries resulting from his employment ceased to be a cause of his disability. The Longshoremen's Act, in Section 2(10) (Title 33, U.S. Code, Section 902(10)), defines "disability" to mean "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Emphasis supplied).

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the decision of the Court of Appeals must be affirmed.

Respectfully submitted,

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